Noraini bte Omar (wife of the deceased, Ku Mansur bin Ku Baharom and mother of the deceased, Ku Amirul bin Ku Mansor) & Anor v Rohani bin Said and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEALS NO K–04–141 OF 2002 AND NO K–04–71 OF 2003

ABDUL AZIZ MOHAMAD, ARIFIN ZAKARIA AND NIK HASHIM JJCA

17 FEBRUARY 2006

Civil Procedure — Judicial precedent — Court of Appeal — Hierarchy of courts — Personal injury or fatal accident claims — Whether Court of Appeal the apex court in such a claim — Whether Court of Appeal bound by majority decision of then Supreme Court in a personal injury or fatal accident claim

Damages (Personal Injury or Death) — Action for — Dependency claim — Statutory multiplier — Whether court may make a deduction for contingencies, other vicissitudes of life and accelerated payment, as was the practice prior to amendment of s 7 Civil Law Act 1956 — Civil Law Act 1956 s 7

Damages (Personal Injury or Death) — Fatal accident — Appropriate multiplier — First appeal concerning claim by widow and son, second appeal by mother of deceased son — Whether court entitled to deduct 1/3 for contingencies — Whether multiplier in s 7(3)(iv)(d) of the Civil Law Act 1956 applicable — Civil Law Act 1956 s 7(3)(iv)(d)

There were two unrelated appeals, No K–04–141 of 2002 as the first appeal and appeal No K–04–71 of 2003 as the second appeal respectively, but since they involved common issue of law they were directed to be heard together. In the first appeal the principal ground of appeal was that the learned sessions court judge failed to take into account contingencies, other vicissitudes of life and the accelerated payment in making the award which by common law should be deducted by 1/3 or such other proportion as the court deems fit. The learned judicial commissioner agreed with the respondent's contention and reduced the said award by 1/3 and the appellants now appeal to this court. The second appeal was against the learned High Court judge decision in reducing the multiplier in calculating the loss of support awarded to the first appellant from 16 years to seven years. In making the reduction in both the cases, the High Court purported to follow the majority decision of the Supreme Court in *Chan Chin Ming & Anor v Lim Yok Eng* [1994] 3 MLJ 233. In both the appeals the common issue was whether under the present provisions of s 7 of the Civil Law Act 1956 ('the Act'), the court may make a deduction for contingencies, other vicissitudes of life and accelerated payment, as was the practice prior to the amendment of s 7 of the Act.

Held, by majority allowing both the appeals:

(1) (per **Arifin Zakaria JCA (now FCJ)**) Having considered the issue at hand, the court agreed with the decision of this court in *Ibrahim bin Ismail & Anor v Hasnah bte Puteh Imat (as beneficiary and legal mother of Bakri bin Yahya and substituting Yahya bin Ibrahim) & Anor and another appeal* [2004] 1 MLJ 525 in that as regard fatal accident and personal injury claims, this court, as the apex court involving such claims, at the present moment, is at liberty to depart from the decision of the Supreme Court if the court thinks that the decision of the Supreme Court was wrong (see para 12).

(2) (per **Arifin Bin Zakaria JCA (now FCJ)**) Based on the decisions of this court in *Ibrahim bin Ismail & Anor v Hasnah bte Puteh Imat (as beneficiary and legal mother of Bakri bin Yahya and substituting Yahya bin Ibrahim) & Anor and another appeal* [2004] 1 MLJ 525 and in *Cheng Bee Teik & Ors v Peter Selvaraj & Anor* [2005] 4 MLJ 301, no deduction ought to be made on account of contingencies, other vicissitudes of life and accelerated payment as was the practice under the common law (see para 13).

(3) (per **Abdul Aziz Bin Mohamad JCA**, dismissing second appeal, allowing first appeal) It is clear that the majority decision of the Supreme Court in *Chan Chin Ming & Anor v Lim Yok Eng* [1994] 3 MLJ 233 was only a decision on loss of support where the deceased was unmarried. If the case was a claim by a wife and children, in view of Peh Swee Chin SCJ's view that the said s 7(3)(iv)(d) of the Civil Law Act 1956 was tailor-made for such a claim, the number of years' purchase might not have been reduced. The High Court in the first appeal therefore erred in relying on *Chan Chin Ming & Anor v Lim Yok Eng* [1994] 3 MLJ 233 to reduce the award by one-third. For that reason, the court would allow the appeal (see para 4).

(4) (per **Abdul Aziz Mohamad JCA**, dismissing second appeal, allowing first appeal) The reason given in *Ibrahim bin Ismail & Anor v Hasnah bte Puteh Imat* [2004] 1 MLJ 525 for saying that this court may depart from *Chan Chin Ming & Anor v Lim Yok Eng* [1994] 3 MLJ 233 was fallacious. It proceeded from the perception that this court is now the apex court in respect of 'All personal injury and fatal accident claims'. But this court is not the apex court in respect of all personal injury and fatal accident cases or in respect of the interpretation of the said s 7(3)(iv)(d) of the Civil Law Act 1956. Section 7 of the Civil Law Act 1956 does not apply only to deaths resulting from motor accidents. It applies to deaths caused by any 'wrongful act, neglect or default' (subsection (1)). There will be cases of such deaths, not arising from motor accidents, and such cases will be tried by the High Court where the claim exceeds RM250,000. In such cases, the apex court will be the Federal Court, and where they involve questions arising under s 7 of the Civil Law Act 1956, including questions arising under the said subparagraph (d), the Federal Court will be the apex court in relation to such questions (see para 10).

[Bahasa Malaysia summary

Terdapat dua rayuan yang tidak berkaitan, No K–04–141 tahun 2002 sebagai rayuan pertama dan rayuan No K–04–71 tahun 2003 sebagai rayuan kedua masing-masing,

tetapi oleh kerana kedua-duanya melibatkan isu undang-undang yang sama, kedua-dua rayuan telah diperintahkan untuk didengar bersama. Sebab utama rayuan pertama ialah hakim mahkamah sesyen yang arif telah gagal mengambil kira kontingensi, jatuh bangun dalam kehidupan dan bayaran tambahan di dalam award di mana melalui common law harus ditolak 1/3 atau sebahagian sebagaimana yang mahkamah fikirkan patut. Pesuruhjaya kehakiman yang bijaksana bersetuju dengan hujahan responden dan mengurangkan award tersebut sebanyak 1/3 dan perayu kini merayu ke mahkamah ini. Rayuan kedua adalah terhadap keputusan Hakim Mahkamah Tinggi yang bijaksana mengurangkan pengganda dalam pengiraan kehilangan mata pencarian yang diawardkan kepada perayu pertama dari 16 tahun ke tujuh tahun. Dalam pengurangan di kedua-dua kes, Mahkamah Tinggi kononnya mengikut keputusan majoriti Mahkamah Agung kes *Chan Chin Ming & Anor v Lim Yok Eng* [1994] 3 MLJ 233. Dalam kedua-dua rayuan, isu yang sama adalah sama ada di bawah peruntukan-peruntukan yang terkini melalui s 7(3)(iv)(d) Akta Undang-Undang Sivil 1956 ('Akta tersebut'), mahkamah boleh membuat pemotongan untuk kontingensi, jatuh bangun dalam kehidupan dan bayaran tambahan, seperti amalan sebelum pindaan kepada s 7 Akta tersebut.

Diputuskan, oleh majoriti membenarkan kedua-dua rayuan:

(1) (oleh **Arifin Zakaria HMR (kini HMP)**) Setelah meneliti isu-isu ini, mahkamah bersetuju dengan keputusan mahkamah ini di dalam kes *Ibrahim bin Ismail & Anor v Hasnah bte Puteh Imat (as beneficiary and legal mother of Bakri bin Yahya and substituting Yahya bin Ibrahim) & Anor and another appeal* [2004] 1 MLJ 525 iaitu berhubungan dengan tuntutan untuk kemalangan yang membawa maut dan kecederaan peribadi, mahkamah ini, sebagai mahkamah tertinggi dalam tuntutan sebegini, pada masa kini, dibenarkan menyimpang daripada keputusan Mahkamah Agung jika mahkamah ini berpendapat bahawa keputusan Mahkamah Agung adalah silap (lihat perenggan 12).

(2) (oleh **Arifin Zakaria HMR (kini HMP)**) Berdasarkan keputusan-keputusan mahkamah ini di dalam kes-kes *Ibrahim bin Ismail & Another v Hasnah bte Puteh Imat (as beneficiary and legal mother of Bakri bin Yahya and substituting Yahya bin Ibrahim) & Anor and another appeal* [2004] 1 MLJ 525 dan *Cheng Bee Teik & Ors v Peter Selvaraj & Anor* [2005] 4 MLJ 301, tiada pemotongan harus dibuat ke atas kontingensi, jatuh bangun dalam kehidupan dan bayaran tambahan seperti amalan di bawah common law (lihat perenggan 13).

(3) (oleh **Abdul Aziz Mohamad HMR**, menolak rayuan kedua, membenarkan rayuan pertama) Ia jelas daripada keputusan majoriti Mahkamah Agung di dalam kes *Chan Chin Ming & Anor v Lim Yok Eng* [1994] 3 MLJ 233 merupakan keputusan atas kehilangan tempat bergantung di mana si mati masih belum kahwin. Jika kes tersebut adalah untuk satu tuntutan oleh isteri dan anak-anak, berdasarkan pendapat Peh Swee Chin HMA bahawa s 7(3)(iv)(d) Akta Undang-Undang Sivil 1956 adalah bersesuaian untuk tuntutan sebegini, jumlah tahun belian ('years' purchase') berkemungkinan tidak akan dikurangkan. Mahkamah Tinggi dalam rayuan pertama dengan ini silap dalam bergantung ke atas kes *Chan Chin Ming & Anor v Lim Yok Eng*

A [1994] 3 MLJ 233 untuk mengurangkan award sebanyak satu pertiga. Atas sebab berikut, mahkamah membenarkan rayuan ini (lihat perenggan 4).

(4) (oleh **Abdul Aziz Mohamad HMR**, menolak rayuan kedua, membenarkan rayuan pertama) Alasan yang diberikan di dalam kes *Ibrahim bin Ismail & Anor v Hasnah bte Puteh Imat* [2004] 1 MLJ 525 yang menyatakan mahkamah ini
B boleh menyimpang daripada kes *Chan Chin Ming & Anor v Lim Yok Eng* [1994] 3 MLJ 233 adalah anggapan yang salah. Ia berpunca daripada anggapan bahawa mahkamah ini kini adalah mahkamah tertinggi berhubungan dengan 'Segala tuntutan kemalangan yang membawa maut dan kecederaan peribadi'. Akan tetapi mahkamah ini bukanlah mahkamah tertinggi berhubungan
C dengan segala kes-kes kemalangan yang membawa maut dan kecederaan peribadi ataupun berhubungan dengan tafsiran s 7(3)(iv)(d) Akta Undang-Undang Sivil 1956. Seksyen 7 Akta Undang-Undang Sivil 1956 tidak terpakai hanya terhadap kematian akibat kemalangan motor. Ia terpakai atas kematian yang diakibatkan dari apa juga 'perbuatan yang salah, kecuaian atau
D kegagalan' (subseksyen (1)). Akan terdapat kes-kes di mana kematian sebegini, yang tidak disebabkan oleh kemalangan motor, dan kes-kes sebegini akan dibicarakan di Mahkamah Tinggi di mana tuntutan melebihi RM250,000. Dalam kes sebegini, mahkamah tertinggi ialah Mahkamah Persekutuan, dan di mana ia melibatkan soal yang dibangkitkan di bawah s 7 Akta Undang-Undang Sivil 1956, termasuk soalan-soalan yang dibangkitkan
E di bawah sub-perenggan (d) tersebut, Mahkamah Persekutuan adalah mahkamah tertinggi berhubung dengan soalan-soalan sebegini (lihat perenggan 10).]

Notes

F For cases on appropriate multiplier, see 6 *Mallal's Digest* (4th Ed, 2004 Reissue) paras 321–324.

For cases on Court of Appeal, judicial precedent, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 3829–3834.

For cases on dependency claim, see 6 *Mallal's Digest* (4th Ed, 2004 Reissue) paras 279–281.

G

Cases referred to

Cassell and Co Ltd v Broome [1972] AC 1027 (refd)

Chan Chin Ming & Anor v Lim Yok Eng [1994] 3 MLJ 233 (not folld)

Cheng Bee Teik & Ors v Peter Selvaraj & Anor [2005] 4 MLJ 301 (folld)

H *Co-operative Central Bank Ltd v Feyen Development Sdn Bhd* [1997] 2 MLJ 829 (refd)

County Council of Hertfordshire v Rural District Council of Barnet [1902] 2 KB 48 (refd)

Ibrahim bin Ismail & Anor v Hasnah bte Puteh Imat (as beneficiary and legal mother of Bakri bin Yahya and substituting Yahya bin Ibrahim) & Anor and another appeal [2004] 1 MLJ 525 (folld)

I

Marappan & Anor v Siti Rahmah bte Ibrahim [1990] 1 MLJ 99 (refd)

Subramanya Sastry v Sheikh Ghannu AIR 1935 Mad 928 (refd)

Takong Tabari v Government of Sarawak & Ors and another appeal [1998] 4 MLJ 512 (not folld)

Teoh Teik Chai v Muhamad bin Hashim (unreported, Civil Appeal No P–45 of 1995) (refd)

Young v Bristol Aeroplane Co Ltd [1944] 2 All ER 293 (refd)

Legislation referred to

Civil Law Act 1956 ss 7 7(3)(iv)(d), 28A(2)(d)(i)
Courts of Judicature Act 1964 s 96(a)
Subordinate Courts Act 1948 ss 65(1)(a), (b), 67(1)

Appeal from: Civil Appeals No 12–26 of 2000 and No 12–47 of 2000 (High Court, Alor Setar)

Aidi Abdullah (NM Tiong & Co) for the appellant.
VK Dasaratharaj (VP Nathan & Partners) for the respondent.

Abdul Aziz Mohamad JCA:

[1] In appeal No 141, the first appeal, the deceased was a married man aged 33 when he died. The persons who suffered loss of support by his death were his widow and son. In compliance with subpara (d) of para (iv) of the proviso to sub-s (3) of s 7 of the Civil Law Act 1956 ('the said subparagraph (d)'), the learned sessions court judge found the number of years' purchase to be eleven (132 months) and, applying that to a multiplicand of RM500 per month, arrived at RM66,000 for loss of support. Since the deceased was 20% liable, the amount awarded for loss of support was RM52,800. On appeal to the High Court, the learned judicial commissioner ruled that there should have been a deduction of one-third on account of contingencies, vicissitudes of life and accelerated payment. So from RM52,800 he deducted RM17,600, being one third of RM52,800, thereby reducing the award to RM35,200.

[2] In appeal No 71, the second appeal, the deceased was an unmarried man aged 23 when he died. The person who suffered loss of support by his death was his mother. In compliance with the said subpara (d), the learned sessions court judge found the number of years' purchase to be 16 (192 months) and, applying that to a multiplicand of RM600 per month, arrived at RM115,000 (rightly RM115,200) for loss of support. Since the defendant's liability was 100%, that was the award for loss of support. On appeal to the High Court, the learned judge reduced the number of years' purchase from 16 to 7.

[3] In making the reduction in both the cases, the High Court purported to follow the majority decision of the Supreme Court in *Chan Chin Ming & Anor v Lim Yok Eng* [1994] 3 MLJ 233, where the deceased was an unmarried man who was 25 when he died and the dependent who suffered loss of support by his death was the mother. In that case, the High Court was the trial court. In the High Court the defendants conceded that in compliance with the said subparagraph (d) the number of years' purchase should be sixteen but apparently they went on to submit that in view of the

contingency of the marriage of the deceased had he lived, the amount for loss of support should be reduced. This is gathered from the following words of Peh Swee Chin SCJ at p 242F:

> Having so conceded, it was then surprisingly submitted by the defendants that such loss of dependency (ie support) would have reduced or ceased in the event of the deceased son getting married had he lived. Such ordinarily unacceptable submission in view of the said act of conceding aforesaid was made both in the court below and before us. Could the defendants do so?

From p 242H–I, it would appear that the trial judge had been of the view that the 16 years should not be reduced because the said subparagraph (d) had fixed it after taking into consideration the possibility of marriage of a deceased unmarried man if he had not died. Peh Swee Chin SCJ then entered upon a consideration of whether the judge was right. Among the matters that he took into consideration that I find significant was his conception that a claim for loss of support by the parents of an unmarried deceased was not the same as a claim for loss of support by the wife and children of a deceased spouse, for which, he said, the said subparagraph (d) seemed to be tailor-made. This was what he said at p 243D–G:

> Having regard to the state of the general system of the law before the coming into force of sub-para (d) on 1 October 1984, sub-para (d) seems to be tailor-made for a claim by a spouse and children as dependants in respect of a deceased spouse, because under the general system of law, both before and after the enactment of sub-para (d), the duration of a claim for loss of support is usually as long as the deceased's loss of earnings which would have been earned had the deceased lived.
>
> On the other hand, the state of the general system of law relating to a parent's claim as a dependant for loss of support in respect of an unmarried child before the enactment of sub-para (d) was that such loss of support would either cease or be reduced considerably on the almost invariable contingency of subsequent marriage of such unmarried child. If the learned judge was right, it would mean that this aspect of the law was swept away or changed.

He stated his conclusion in the following words at p 244A–C:

> In the result, I am unable to agree with the view of the learned trial judge that sub-para (d) applied to the claim in the instant case, ie the claim of a parent as dependant for loss of support in respect of a deceased unmarried child.
>
> I, therefore, agree with the contention of the learned counsel for the defendants that the number of years' purchase should be reduced and I hereby reduce it to seven years, after taking into account the contingencies and circumstances in this case.

By 'the contingencies and circumstances in this case', Peh Swee Chin SCJ must have been thinking mainly of the fact that the deceased was unmarried.

[4] Considering what I have set out about the majority decision in that case, it is clear to me that the decision was only a decision on loss of support where the deceased was unmarried. If the case was a claim by a wife and children, in view of Peh Swee Chin SCJ's view that the said subparagraph (d) was tailor-made for such a claim, the number of years' purchase might not have been reduced. The High Court

in appeal No 141 therefore erred in relying on *Chan Chin Ming* to reduce the award by one-third. For that reason I would allow the appeal and order that the award of the sessions court be reinstated.

[5] Appeal No 71 depends on whether *Chan Chin Ming* is binding on this court. Notwithstanding that it was a majority decision, it was a decision of a court of a higher tier, and the apex court at that. That a court has to accept loyally a considered decision of a court of a higher tier and is not entitled to question it was reiterated by Lord Hailsham in the following passage in *Cassell and Co Ltd v Broome* [1972] AC 1027 which, in *Co-operative Central Bank Ltd v Feyen Development Sdn Bhd* [1997] 3 MLJ 829, the Supreme Court adopted and appears at p 836:

> The fact is, and I hope that it will never be necessary to say so again, that in the hierarchical system of courts that exists in this country, it is necessary for each lower tier, including the Court of Appeal, to accept loyally the decisions of the higher tiers. Where decisions manifestly conflict, the decision in *Young v The Bristol Aeroplane Co* offers guidance to each tier in matters affecting its own decisions. It does not entitle it to question considered decisions in the upper tiers with the same freedom.

We have to accept the decisions of the higher court even if we do not agree with them, and as regards the decision in *Chan Chin Ming*, there is no necessity for me in this appeal to say whether I think the decision was right or wrong.

[6] In *Takong Tabari v Government of Sarawak & Ors and another appeal* [1998] 4 MLJ 512, this court (Shaik Daud, Siti Norma Yaakob and Ahmad Fairuz JJCA) decided that they were bound by *Chan Chin Ming*. The deceased was a married man and the claim for loss of support was by the widow who was dissatisfied by the High Court's deduction of one-third for contingencies, other vicissitudes of life and accelerated payment. The widow, undoubtedly assuming that *Chan Chin Ming* would apply to all cases, and not only, as is my opinion, to cases of deceased bachelors, did argue against the majority decision in *Chan Chin Ming* This is reflected at p 522G–I:

> It is the widow's contention that such a deduction is contrary to law as by the introduction of proviso (d) to s 7(3)(iv) of the Act on 1 October 1984, the discretion to deduct a sum for contingencies, other vicissitudes of life and accelerated payment at common law is now no longer available and with the replacement of that common law practice, there is already a built-in deduction in the statutory formula itself and a further deduction as was done in this case was not proper. She contends that the estate is entitled to be paid the total sum of RM270,000 for her claim for loss of dependency. For this contention, she relies on the minority decision of the Supreme Court in the case of *Chan Chin Ming & Anor v Lim Yok Eng* [1994] 3 MLJ 233.

[7] The correctness of the decision in *Chan Chin Ming* was again questioned and argued on in *Teoh Teik Chai v Muhamad bin Hashim* (unreported, Civil Appeal No P–45 of 1995). The deceased was an unmarried man aged 24 when he died. The High Court decided that the number of years' purchase was eight instead of sixteen. Again this court (Mokhtar Sidin, Abdul Kadir Sulaiman, KC Vohrah JJCA) decided, on June 25, 2002, that they were bound by the decision in *Chan Chin Ming*.

[8] It was in*Ibrahim bin Ismail & Anor v Hasnah bte Puteh Imat* [2004] 1 MLJ 525 that this court (Gopal Sri Ram, Tengku Baharudin Shah JJCA, Zaleha Zahari J (now JCA)), after concluding, for reasons given in paragraphs [7] to [14], that *Chan Chin Ming* was wrongly decided by the majority, decided that this court is entitled to depart from *Chan Chin Ming*. The reason for the decision was given in the following words of Gopal Sri Ram JCA at p 536E–G:

> Having come to the conclusion that *Chan Chin Ming* was wrongly decided by the majority in that case, are we entitled to depart from it? We think we are. *Chan Chin Ming* was decided before the establishment of this court. It was decided at a point of time when the High Court had original jurisdiction over personal injury and fatal accident claims. Appeals were preferred to the Supreme Court which stood at the apex of the judicature. That is not the case today. All personal injury and fatal accident claims are now solely within the jurisdiction of the subordinate courts. Appeals are to the High Court and finally to this court. We therefore now stand at the apex in respect of these claims. If a decision — and more so as here a majority decision — of the former Supreme Court is obviously wrong, then it is our plain duty to say so. It will, with respect, be an abdication of our solemn duty to simply fold our arms in abject submission and permit an erroneous statement of the law to continue to form part of our jurisprudence especially when it results in an injustice to a litigant.

Ibrahim bin Ismail was followed by this court (Abdul Malek Ahmad PCA, Arifin Zakaria, Tengku Baharudin Shah JJCA) in *Cheng Bee Teik & Ors v Peter a/l Selvaraj & Anor* [2005] 4 MLJ 301.

[9] So I am now faced with two conflicting decisions of this court as to whether *Chan Chin Ming* is binding on this court. The decision in the two earlier cases, *Takong Tabari* and *Teow Teik Chai*, is that it is binding. It is in strict compliance with the principle of the binding effect of considered decisions of a court of a higher tier as emphasized by the Supreme Court in the *Feyen* case. The decision in the two later cases, *Ibrahim bin Ismail* and *Cheng Bee Teik*, is that *Chan Chin Ming* is not binding on this court and this court is entitled to depart from it. According to *Young v Bristol Aeroplane Co Ltd* [1944] 2 All ER 293, at p 300F–G: 'The court is entitled and bound to decide which of two conflicting decisions of its own it will follow'.

[10] I will follow the two earlier decisions because, with great respect, I am of the view that the reason given in *Ibrahim bin Ismail* for saying that this court may depart from *Chan Chin Ming* is fallacious. It proceeds from the perception that this court is now the apex court in respect of 'All personal injury and fatal accident claims'. But this court is not the apex court in respect of all personal injury and fatal accident cases or in respect of the interpretation of the said subparagraph (d). By virtue of s 65(1)(a) of the Subordinate Courts Act 1948, 'all actions and suits of a civil nature in respect of motor vehicle accidents' are triable by the sessions court. And by virtue of s 67(1) of the Subordinate Courts Act 1948, s 96(a) of the Courts of Judicature Act 1964, this court is the apex court in respect of decisions of the subordinate courts in any civil causes or matters. Therefore this court is the apex court for civil actions and suits in respect of motor vehicle accidents. But s 7 of the Civil Law Act 1956 does not apply only to deaths resulting from motor accidents. It applies to deaths caused by any 'wrongful act, neglect or default' (subsection (1)). There will be cases of such deaths, not arising from motor accidents, such as *Takong Tabari*, where the deceased

died in an explosion at the premises of a bank, and such cases will be tried by the High Court where the claim exceeds RM250,000, the sessions court's limit of jurisdiction under s 65(1)(b) of the Subordinate Courts Act 1948. In such cases the apex court will be the Federal Court, and where they involve questions arising under s 7 of the Civil Law Act 1956, including questions arising under the said subparagraph (d), the Federal Court will be the apex court in relation to such questions.

[11] It was submitted by learned counsel for appellant in appeal No. 71 that had the earlier decision of the Supreme Court in *Marappan & Anor v Siti Rahmah bte Ibrahim* [1990] 1 MLJ 99 been cited in *Chan Chin Ming*, the majority in *Chan Chin Ming* would have held *Marappan* as binding and therefore we are at liberty to follow the decision in *Marappan*. It was a case of personal injury that did not result in death, sustained in a motor accident when the plaintiff was 23 years old. Paragraph (d)(i) of subsection (2) s 28A of the Civil Law Act 1956 provides as follows:

> (d) in assessing damages for loss of future earnings the Court shall take into account that —
>
> (i) in the case of a person who was of the age of thirty years or below at the time when he was injured, the number of years' purchase shall be 16;

The number of years' purchase in subparagraph (i) corresponds with that in the first limb of the said subparagraph (d) in s 7. Although both parties had agreed to a multiplier of 15, as the number of years' purchase, the High Court had awarded a multiplier of 16. The Supreme Court ruled at p 101A (right) that the High Court was right because the language of the provision is mandatory.

[12] I do not think that the decision in *Marappan* would have influenced the majority in *Chan Chin Ming* because in *Chan Chin Ming* the consideration that influenced their decision was the length of support that a dependent parent could be expected to enjoy from a deceased child had he continued to live, in view of the contingency of his marriage. That consideration did not exist in *Marappan* because it was not a claim for loss of support by dependants but a claim for loss of future earnings by the injured person herself.

[13] Since I am of the view that the decision in *Chan Chin Ming* is binding on this court, I would dismiss appeal No 71. As I said, I would allow appeal No 141.

Arifin Zakaria JCA:

[14] These are two unrelated appeals, but since they involved common issue of law we directed that they be heard together. For convenience, in this judgment, I shall refer to appeal No K–04–141 of 2002 as the first appeal and appeal No K–04–71 of 2003 as the second appeal respectively.

[15] In the first appeal the learned sessions court judge awarded the sum of RM52,800 to the appellants for loss of support based on 20% liability by the

deceased. Dissatisfied with the said decision the respondent then appealed to the High Court. The appeal was only as regard quantum. The principal ground of appeal was that the learned sessions court judge failed to take into account contingencies, other vicissitudes of life and the accelerated payment in making the award which by common law should be deducted by 1/3 or such other proportion as the court deems fit. The learned judicial commissioner agreed with the respondent's contention and reduced the said award by 1/3 to RM35,200 and the appellants now appeal to this court.

[16] The second appeal is against the learned High Court judge decision in reducing the multiplier in calculating the loss of support awarded to the first appellant from 16 years to seven years.

[17] In both the appeals the common issue is whether under the present provisions of s 7 of the Civil Law Act 1956 ('the Act') the court may make a deduction for contingencies, other vicissitudes of life and accelerated payment, as was the practice prior to the amendment of s 7 of the Act. The relevant provisions of the said section reads as follows:

> 7. Compensation to the family of a person for loss occasioned by his death
>
> (1) …
>
> (2) …
>
> (3) The damages which the party who shall be liable under subsection (1) to pay to the party for whom and for whose benefit the action is brought shall, subject to this section, be such as will compensate the party for whom and for whose benefit the action is brought for any loss of support suffered together with any reasonable expenses incurred as a result of the wrongful act, neglect or default of the party liable under subsection (1):
>
> Provided that —
>
> (i)…
>
> (iv) In assessing the loss of earnings in respect of any period after the death of a person where such earnings provide for or contribute to the damages under this section the Court shall —
>
> (a)…
>
> (b) take into account that in the case of a person who was of the age of thirty years and below at the time of his death, the number of years' purchase shall be 16; and in the case of any other person who was of the age range extending between thirty one years and fifty four years at the time of his death, the number of years' purchase shall be calculated by using the figure 55, minus the age of the person at the time of death and dividing the remainder by the figure 2.

[18] In both the cases under appeal, the learned judicial commissioner and the High Court judge held that they were bound by the decision of this court in *Takong Tabari v Government of Sarawak & Ors and another appeal* [1998] 4 MLJ 512 which in turn relied on the majority decision of the Supreme Court in *Chan Chin Ming & Anor v Lim Yok Eng* [1994] 3 MLJ 233. There, it was held that the amendment to the Act in 1984 does not abrogate the common law principle that contingencies,

other vicissitudes of life and accelerated payment must be taken into account in the determination of award under s 7 of the Act.

[19] Before us the learned counsel for the appellants in the two appeals, relying on the decision of this court in *Ibrahim bin Ismail & Anor v Hasnah bte Puteh Imat (as beneficiary and legal mother of Bakri bin Yahya and substituting Yahya bin Ibrahim) & Anor and another appeal* [2004] 1 MLJ 525 urged us to depart from the Supreme Court decision in *Chan Chin Ming*. In *Ibrahim bin Ismail*, it was held, inter alia, that this court was entitled to depart from *Chan Chin Ming* if it thinks that the decision therein was wrong. This was because when *Chan Chin Ming* was decided the High Court had original jurisdiction over personal injury and fatal accident claims. Appeals were then preferred to the Supreme Court which then stood as the apex court in such claims. However, today since this court stands at the apex of personal injury and fatal accident claims, therefore, this court is free to depart from the decision of the Supreme Court in such matters if it holds that the Supreme Court had come to a wrong decision.

[20] This court in *Ibrahim bin Ismail* did just that. It held that the majority decision in *Chan Chin Ming* was wrong and that the dissenting decision of Edgar Joseph Jr SCJ correctly stated the law and in the same breath disagreed with *Takong Tabari*. It said that, it is a cardinal guide to statutory interpretation that when a statute lays down a specific code or formula to meet a particular mischief of the common law, it is not open to the courts to treat themselves as at liberty to continue to apply the common law in disregard of statute. It was this very principle that the majority in *Chan Chin Ming* breached when purporting to interfere with the pre-determined statutory formula applicable in the calculation of loss of earnings in fatal accident and personal injury claims. The majority in *Chan Chin Ming* was thus exercising legislative and not interpretive jurisdiction. It further held that the majority also overlooked the point that the language of the statute is imperative. It provides that 'the number of years purchase *shall* be 16'.

[21] The learned counsel for the respondents in these two appeals, however, urged us to follow the Supreme Court decision in *Chan Chin Ming* saying that, being the decision of the apex court, therefore, it is binding on us. To go against the said decision is to disregard completely the principle of *stare decisis*. They submitted, if at all the Supreme Court had erred in its decision, it is certainly not within the competence of this court to correct the Supreme Court as was purportedly done in the case of *Ibrahim Bin Ismail*. It is only the Supreme Court or its successor who can correct the wrong and not the Court of Appeal.

[22] Mr Brijnandan Singh Bhar, learned counsel for the appellant in the second appeal pointed out the fallacy of the respondents' contention, in that, since the setting up the present Court of Appeal on 24 June 1994, all appeals emanating from the Sessions Court terminate in the Court of Appeal. Therefore, the correctness or otherwise of the decision of the majority in *Chan Chin Ming* could never be tested in the highest court of the land.

[23] It is pertinent to note that the same issue was raised in *Cheng Bee Teik & Ors v Peter Selvaraj & Anor* [2005] 4 MLJ 301 of this court, where I sat with Abdul Malek PCA and Tengku Baharudin Shah JCA. In that case the claim arose out of a road traffic accident between two motorcycles and a motor van. The first appellant was the rider of motorcycle PDK 3393, while the second appellant was the grandmother and dependant of the deceased who was riding pillion on the first appellant's motorcycle. The third appellant was the father and dependant of the deceased rider of the second motorcycle PDF 8839. The first respondent was the driver of the motor van PBY 7446 and the second respondent was the owner of the motor van.

[24] One of the issues that came on appeal before us was whether the learned High Court judge was right in making a deduction of ¼ for loss of future earnings and future cost of prosthesis awarded to first appellant and also in reducing the years of purchase to five years for the second appellant and to 10 years for the third appellant. In making the award, the learned judge was relying on the judgement of this court in *Takong Tabari*. In his judgement, the learned judge stated:

> In respect of this Mr. Rajendran's complaint is that there ought to be a 1/3 deduction from the total award made for future loss based on the Court of Appeal's decision in *Takong Tabari v Government of Sarawak & Ors and another appeal* [1998] 4 MLJ 52 which followed the decision of the Federal Court in *Chan Chin Ming & Anor v Lim Yok Eng* [1994] 3 MLJ 233 which gave the court the right to deduct a sum for contingencies and based on other vicissitudes of life and also taking into account the accelerated payment. Since it is open to each court to consider each case on its own special features when taking into account the principles of contingencies and other vicissitudes of life, and bound by the decision of the Federal Court and the Court of Appeal on the application of the said principle, I find that there ought to be a deduction made. However, since there was no basis nor explanation for a standard 1/3 deduction, I am of the view that I am not transgressing the principle of stare decisis if I exercise my discretion based on the background of the lives of the plaintiffs herein, and make a deduction of ¼ of the total award made.

[25] When that case was decided, the case of *Ibrahim bin Ismail* was yet to be decided, therefore, the learned judge was thus bound by the decision of this court in *Takong Tabari*. On appeal before us, we had the benefit of the judgement of this court in *Ibrahim bin Ismail*. Having considered the issue at hand, we agreed with the decision of this court in *Ibrahim bin Ismail* in that as regard fatal accident and personal injury claims, this court, as the apex court involving such claims, at the present moment, is at liberty to depart from the decision of the Supreme Court if we think that the decision of the Supreme Court was wrong. As was said by Gopal Sri Ram JCA in *Ibrahim bin Ismail*at p 536:

> If a decision — and more so as here a majority decision — of the former Supreme Court is obviously wrong, then it is our plain duty to say so. It will, with respect, be an abdication of our solemn duty to simply fold our arms in abject submission and permit an erroneous statement of the law to continue to form part of our jurisprudence especially when it results in an injustice to a litigant.

In *Cheng Bee Teik*, we gave our reasons why we ought to depart from *Chan Chin Ming*. They are as follows:

The purpose of the amendment introduced by way of ss 7(3) and 28A of the CLA, we think, was correctly stated by Gopal Sri Ram JCA in *Ibrahim bin Ismail* at p 534 which reads —

> Now, it is common knowledge that Parliament's purpose was to address the very high award of damages for personal injuries and death. This resulted from three causes. First, the application of a flexible multiplier based on the facts and circumstances of each case. So, one could get a multiplier in excess of 16 years for a plaintiff or deceased who was below the age of majority. Second, the admission of an award for 'lost years'. As a result awards for loss of future earnings were frequently handed down in favour of non-employed injured plaintiffs or the estate of deceased victims. Very young children received huge awards based on their future prospects. In *Yang Salbiah & Anor v Jamil bin Harun* [1981] 1 MLJ 292, for example, a 7 year old girl who had become vegetative was awarded a sum in excess of RM30,000 for loss of future earnings based on a multiplier of 25 years purchase. Again, in *Chiang Boon Fatt v. Lembaga Kemajuan Negeri Pahang & Anor, Chin Yee Thow v Lembaga Kemajuan Negeri Pahang & Anor* [1983] 1 MLJ 89, the dependants of a youth who was killed in an accident just as he was about to enter university were awarded RM15,000 as loss of dependency for the lost years on a multiplier of 5 years purchase based on a predicted income he never earned. Third, a person who had attained or exceeded the age of 55 years could claim for loss of future earnings. Thus, in *Tan Kheng Kuan v Lim Cheng Teik & Ors* [1965] 1 MLJ 116 a 56 year old plaintiff who was working as a trishaw rider was warded loss of future earnings. To emphasise, it is to prevent these types of awards that Parliament acted. That is why you find the fixed formula for the multiplier in the amendments.

It is a cardinal principle of the interpretation of statutes that the court should look first to the words of the statute itself, and if these words are plain, it is not permissible to consider what was the intention of the statute or the previous history of the law (see *Subramanya Sastry v Sheikh Ghannu* AIR 1935 Mad 928). In *County Council of Hertfordshire v. Rural District Council of Barnet* (1902) 2 KB 48, at p 52 Vaughan Williams LJ stated thus:

> … It is not denied that the words of s. 3 of the Highways and Bridges Act, 1891, are such that, if they are construed in their natural sense, the section must be read as giving to the surveyor of highways the power to make the contract which was made in this case. But it is said that, by so construing them, we should be imputing to the Legislature that in this section they had made an enactment which was not entirely consistent with previous legislation as to the surveyor of highways and the previous history of that office. I do not think that this would be a sufficient reason for not giving to the section the meaning which is plainly conveyed by the words of it. The considerations urged by the counsel for the defendants do not appear to me sufficient to justify us in refusing to construe the section according to what seems to be the manifest intention of the Legislature as expressed by the language which they have used.

We are of the opinion that words embodied in ss 7(3) and 28A of the CLA are plain, and therefore, in line with the above stated authorities, it is not open to this court to explore what is the real intention underlying the said provisions or the previous history of the law on this matter.

[26] Thus, based on the decisions of this court in *Ibrahim bin Ismail* and in *Cheng Bee Teik*, discussed above, I am firmly of the view that no deduction ought to be made on account of contingencies, other vicissitudes of life and accelerated payment as was the practice under the common law.

A [27] In the result I would allow both the appeals herein. Consequently, in the first appeal, I order that, the order of the learned judicial commissioner deducting 1/3 from the sum of RM52,000 for loss of support, be set aside and the award of the learned sessions court judge be reinstated. Similarly, in the second appeal, the order of the learned High Court judge in reducing the multiplier from 16 years to seven years, is set aside and the order of the learned sessions court judge is accordingly reinstated. Applying the 16 years' purchase (192 months) to the multiplicand of RM600 per month, the loss of support will come to RM115,200 and not RM115,000 as awarded by the learned sessions court judge. Apparently there is an error in the calculation. Accordingly, the award for loss of support in the second appeal will be in the sum of RM115,200.

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C [28] It is further ordered that the appellants in both the appeals be awarded costs of these appeals and in the court below. The deposits to be refunded to the respective appellants.

D [29] My learned brother Nik Hashim JCA (now FCJ) has read this judgment in draft and has expressed his agreement with it.

Appeals allowed.

E Reported by Sally Kee

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